

October 2, 2007

Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE JERILYN H. SILVER,

Debtor.

BAP No. NM-07-054

LINCOLN NATIONAL LIFE
INSURANCE CO., individually and as
Assignee of SANTA FE PRIVATE
EQUITY FUND, II, L.P.,

Bankr. No. 7-96-11878-SS
Adv. No. 98-01281-S
Chapter 7

Plaintiff - Appellee,

v.

JERILYN H. SILVER,

ORDER AND JUDGMENT*

Defendant - Appellant.

Appeal from the United States Bankruptcy Court
for the District of New Mexico

Before CLARK, MICHAEL, and NUGENT, Bankruptcy Judges.

NUGENT, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

Debtor appeals the bankruptcy court's judgment revoking her discharge

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

under 11 U.S.C. § 727(d)(2).¹ We AFFIRM.

I. Factual Background

On or about April 10, 1996, the United States District Court for the Northern District of Illinois issued a \$24,173,894.98 judgment (“the Illinois Judgment”) against Debtor’s former husband, A. David Silver (“Mr. Silver”), in favor of Appellee Lincoln National Life Insurance Company (“Lincoln”).² Debtor filed her individual Chapter 7 bankruptcy petition on May 2, 1996. The deadline for filing objections to her discharge was August 12, 1996. No objection to discharge was filed by Lincoln, the case trustee, or the United States Trustee before or after the deadline. The Illinois Judgment was recorded in the United States District for the District of New Mexico judgment docket on October 30, 1997.³ Debtor received her discharge on December 17, 1997.

One year later, on December 17, 1998, Lincoln filed a complaint seeking to revoke Debtor’s discharge pursuant to § 727(d). On October 6, 2003, Debtor moved to dismiss the proceeding, claiming Lincoln had no standing as it was not one of her creditors as defined under the Bankruptcy Code.⁴ On April 15, 2004, after considering the written arguments of the parties, the bankruptcy court found Lincoln should be allowed to prove the allegation that the marital community benefitted from the actions of Mr. Silver, that Debtor’s actions justify the revocation of her discharge, and that the action was timely brought.⁵ The

¹ All future references to “Section” or “§” refer to the Bankruptcy Code, Title 11 of the United States Code, unless otherwise noted.

² Judgment attached as Exhibit 1 to Motion to Revive Judgment, *in* Appellant’s Amended Appendices (“Appellant’s App.”) at Tab 2.

³ Judgment Docket, United States District Court, District of New Mexico, *in* Appellant’s App. at 1.

⁴ Motion to Dismiss Adversary Proceeding, *in* Appellant’s App. at 28-29.

⁵ Order Denying Motion to Dismiss Without Prejudice, *in* Lincoln’s
(continued...)

bankruptcy court denied Debtor's motion to dismiss without prejudice and allowed the adversary proceeding to proceed to trial.⁶

The trial was held on October 25, 26, 27, 28, and 29, 2004. At the conclusion of the trial, the bankruptcy court took the matter under advisement.⁷ On April 16, 2007, the bankruptcy court issued a judgment revoking Debtor's discharge, finding: (1) Lincoln is a creditor of the community and has standing to bring the action because Debtor failed to meet her burden of establishing lack of benefit to the community, (2) Debtor violated § 727(a)(2)(A), (a)(4)(A), and (d)(2), commenting "there can be little doubt that [Debtor's] actions in her bankruptcy case were riddled with false disclosures and related non-disclosures that amounted to fraud[,]""⁸ and "it is quite clear [that Debtor], in cooperation with Mr. Silver, violated both the spirit and the letter of the Bankruptcy Code[,]""⁹ (3) Lincoln is barred from pursuing discharge revocation for Debtor's § 727(d)(1) violations, and (4) Lincoln's midnight filing was made soon enough to catch Debtor's § 727(d)(2) violations.

On appeal, Debtor's principal argument is that Lincoln lacked standing to seek revocation of her discharge because it was not a creditor of her or her former husband's estate in light of its failure to properly domesticate and renew the Illinois Judgment according to New Mexico law. Debtor also alleges misconduct on the part of Lincoln's counsel and asks this Court to compel him to produce proof that Lincoln domesticated the Illinois Judgment in New Mexico state courts.

⁵ (...continued)
Appendix at 23-24.

⁶ *Id.*

⁷ Docket Report at 3, *in* Appellant's App. at 114.

⁸ Memorandum Opinion in Support of Judgment Revoking the Discharge of Jerilyn H. Silver at 41, *in* Appellant's App. at 81.

⁹ *Id.* at 60, *in* Appellant's App. at 100.

II. Jurisdiction

We have jurisdiction over this appeal. The judgment from which Debtor appeals is final for purposes of appeal, and the parties have consented to this Court's jurisdiction by failing to elect to have the appeal heard by the United States District Court for the District of New Mexico.¹⁰

III. Standard of Review

We review the bankruptcy court's factual findings for clear error and its conclusions of law de novo.¹¹ Standing to seek revocation of discharge under § 727(d) is a question of law which we review de novo.¹²

IV. Discussion

Standing to pursue a discharge revocation depends on whether the movant is a creditor.¹³ Noting that Debtor did not dispute that the Illinois Judgment was entered and valid as to Mr. Silver and that Lincoln concedes that the judgment is not a separate debt of Debtor, the bankruptcy court focused on whether the Illinois Judgment was a community debt and therefore a liability of Debtor. The bankruptcy court ultimately concluded Lincoln was a creditor of the community since Debtor did not meet her burden of establishing lack of benefit to the community. Debtor claims the bankruptcy court erred in (1) assuming that she did not dispute that the judgment was entered and was valid as to Mr. Silver and

¹⁰ 28 U.S.C. § 158(a)(1) & (c)(1); Fed. R. Bankr. P. 8001-8002; 10th Cir. BAP L.R. 8001-1; *see Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (order is final if it “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

¹¹ *In re S. Med. Arts Cos. Inc.*, 343 B.R. 258, 261 (10th Cir. BAP 2006).

¹² *In re Korte*, 262 B.R. 464, 470 (8th Cir. BAP 2001).

¹³ § 727(d).

(2) determining that she benefitted from Mr. Silver's actions.¹⁴

Debtor argues the Illinois Judgment was not a valid judgment against Mr. Silver because it was never domesticated or revived in New Mexico state court, and thus expired. Lincoln rejoins that Debtor did not challenge the validity of the Illinois Judgment in the bankruptcy court proceeding nor did she present evidence to question its validity. Debtor submitted a copy of Lincoln's Motion to Revive Judgment, which was filed with the United States District Court for the District of New Mexico on September 17, 2004, as evidence of Lincoln's failure to domesticate.¹⁵ Lincoln asserts that its motion to revive was never presented to or considered by the bankruptcy court. Debtor does not dispute this, but asks this Court to use its "inherent power to supplement the record on appeal."¹⁶ This Court will not consider as part of the record on review a document that was not before the bankruptcy court.¹⁷

In addition, we will not consider an argument raised for the first time on appeal.¹⁸ Debtor argues that the bankruptcy court placed this point at issue by erroneously assuming she did not object to the validity of the Illinois Judgment. This argument is specious. We note that while Debtor did file a motion to dismiss Lincoln's complaint based on lack of standing, there is nothing in the record to show that this particular argument was pursued at trial or that any evidence regarding the lack of domestication was offered to the bankruptcy court.

¹⁴ We note that Debtor does not contest the bankruptcy court's findings of her wrongdoing.

¹⁵ Motion to Revive Judgment, *in* Appellant's App. at 2-5.

¹⁶ Appellant's Reply Br. at 5.

¹⁷ *See, e.g., Aero-Med., Inc. v. United States*, 23 F.3d 328, 329 n.2 (10th Cir. 1994); *Boone v. Carlsbad Bancorp., Inc.*, 972 F.2d 1545, 1549 n.1 (10th Cir. 1992).

¹⁸ *In re Cozad*, 208 B.R. 495, 498 (10th Cir. BAP 1997).

Accordingly, we will not consider this issue. Even if we were inclined to consider this issue, we have grounds to summarily affirm the bankruptcy court's decision because Debtor has failed to provide this Court with the trial transcript and exhibits. Typically, when there is not an adequate record, the bankruptcy court's judgment is summarily affirmed.¹⁹ This is particularly important in this case where, because of the lack of record, this Court has no way to review whether the Illinois Judgment was properly domesticated or revived in New Mexico.

Likewise, without the trial record, this Court has no way to review the bankruptcy court's determination that Debtor failed to meet her burden of establishing lack of benefit to the community. If an appellant urges that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.²⁰ It is appellant's responsibility to ensure that a relevant transcript is provided, and this Court is under no obligation to remedy any failure of appellant to provide a sufficient record.²¹

V. Conclusion

Given the state of the record on appeal, the judgment of the bankruptcy court is AFFIRMED.

¹⁹ See, e.g., *Travelers Indem. Co. v. Accurate Autobody, Inc.*, 340 F.3d 1118, 1121 (10th Cir. 2003).

²⁰ Fed. R. App. P. 10(b)(2).

²¹ See *Deines v. Vermeer Mfg. Co.*, 969 F.2d 977, 979 (10th Cir. 1992).